STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 8, 2011
v	No. 297936 Oakland Circuit Court
CHARLES JOE THORPE, Defendant-Appellant.	LC No. 2009-225656-FH

Before: K.F. KELLY, P.J., and METER and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for operating a vehicle while intoxicated, a violation of MCL 257.625. Defendant was sentenced to 30 days of jail and one year of probation for his conviction. We affirm.

I. BASIC FACTS

Police Officer Jesse Fullerton received information that there was a possible intoxicated driver at a White Castle on Greenfield Road in Oak Park near Eleven Mile and that the driver was headed northbound on Greenfield Road. The informant, John Tyler Damon, dialed 911 and informed the dispatcher that he was at the White Castle drive-through line and that "the guy in the car ahead of [him was] drunk." Damon identified himself and provided the police with details of the vehicle including the make – a Pontiac Solstice – and the license plate number. Damon also provided the police with the vehicle's direction of travel. Subsequently, Fullerton spotted a vehicle near the White Castle matching the description given by Damon. Fullerton began to follow the Pontiac on Greenfield Road just south of Eleven Mile Road in Oak Park. Eleven Mile Road delineates the border between Oak Park and Berkley. Fullerton observed the vehicle "weaving in its lane of traffic" and "drive on top of the white line which I believed was crossing the white line on two occasions." When Fullerton engaged his emergency lights in an attempt to stop the Pontiac, the vehicle continued to travel a quarter of a mile before pulling over. Fullerton stopped the Pontiac less than one mile into Berkley.

Fullerton approached the vehicle and observed that the driver, defendant, slurred his speech. Fullerton also saw that defendant's eyes were "glassy," and the officer smelled a strong odor of alcohol emanating from the vehicle. Defendant informed Fullerton that he drank two 12-ounce bottles of Bud light beer and one scotch on the rocks. Fullerton asked defendant several follow up questions including what date it was to which defendant incorrectly answered that it

was December 5, 2009, when it was January 5, 2009. As defendant stepped out of the vehicle, the vehicle began to slowly roll backwards. Defendant had failed to engage the brake. Fullerton yelled at defendant to pull the emergency brake. Defendant pulled the emergency brake and stopped the vehicle. As defendant got out of the Pontiac, he fell backwards into Fullerton. Fullerton picked defendant up and helped him out of the vehicle. Fullerton administered three field sobriety tests, which defendant poorly performed. The video camera in Fullerton's patrol vehicle did not capture defendant or Fullerton during their interaction; however, the microphone was on and recorded their conversation.

Defendant was placed under arrest and transported to the police station where he was read his chemical rights (DI 177 form). When asked to submit to a breath test, defendant asked if he could have an independent test administered. Fullerton advised defendant that before he could take an independent chemical test, defendant first had to perform the test requested by the officer or risk losing his driving privileges. Defendant then signed the chemical consent form agreeing to take the chemical breath test. The test indicated a blood alcohol level of 0.18. After submitting to the chemical breath test, defendant made no further inquiry into the availability of an independent chemical test.

II. HOME RULE VIOLATION

Defendant first argues that Fullerton, an Oak Park police officer, violated MCL 764.2a because he pursued and arrested defendant in Berkley. Fullerton failed to notify Berkley of his pursuit and arrest of defendant, in violation of MCL 764.2a. There was no "hot pursuit" or exigent circumstance to validate the officer's failure to comply with the statute; therefore, the case should have been dismissed and any evidence should have been suppressed. We disagree. This Court reviews a trial court's factual findings at a suppression hearing for clear error but reviews the ultimate ruling on a motion to suppress de novo. *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002). The trial court's factual findings are clearly erroneous if, after review of the record, this Court is left with a definite and firm conviction that a mistake has been made. *Davis*, 250 Mich App at 362.

MCL 764.2a prohibits a police officer from acting outside his or her jurisdiction without acting in conjunction with police officers that have jurisdiction. *People v Hamilton*, 465 Mich 526, 530; 638 NW2d 92 (2002), abrogated on other grounds *Bright v Ailshie*, 465 Mich 770, 775 (2002). A police officer may act outside his or her jurisdiction if he or she is in pursuit of a suspect. MCL 117.34 provides:

> When any person has committed or is suspected of having committed any crime or misdemeanor within a city, or has escaped from any city prison, the police officers of the city shall have the same right to pursue, arrest and detain such person without the city limits as the sheriff of the county.

However, "[t]he purpose of MCL 764.2a is not to protect the rights of criminal defendants, but rather to protect the rights and autonomy of local governments." *People v Clark*, 181 Mich App 577, 581; 450 NW2d 75 (1989). As a result, evidence obtained pursuant to a statutorily unlawful arrest that was constitutionally valid need not be suppressed. *People v Lyon*, 227 Mich App 599, 610-611; 577 NW2d 124 (1998).

In *Hamilton*, the Michigan Supreme Court addressed the issue of whether the legislature intended that a violation of MCL 764.2a should result in the exclusion of evidence obtained as a result of an arrest. *Hamilton*, 465 Mich at 529. The police officer in *Hamilton* noticed a driver did not have operating taillights and also noticed that the driver swerved. The officer was out of his jurisdiction when he stopped the driver on the suspicion that the driver was under the influence of alcohol. *Id.* at 527-528. The defendant was charged with a felony based his prior OUIL offenses. He moved to suppress the evidence regarding his field sobriety test and any other evidence related to the stop based on a violation of MCL 764.2a where the officer admitted that he was not in "hot pursuit" of the defendant and failed to contact the authorities for the jurisdiction in which he followed the defendant. *Id.* at 528-529. The district court bound the defendant over for trial, but the circuit court granted the defendant's motion to suppress and dismissed the case. This Court affirmed. *Id*. In reversing, the Michigan Supreme Court stated:

> It is clear from previous decisions of this Court that a statutory violation like the one in this case does not necessarily require application of an exclusionary rule. The question in such cases is whether the Legislature intended to apply the drastic remedy of exclusion of evidence. In several recent decisions we have found such intent lacking. See *People v Sobczak, supra* (failure to comply with the statutory requirement that an affidavit in support of a search warrant be left with the defendant at the time of execution of the warrant, MCL 780.654, 780.655; *People v Stevens, supra* (failure to comply with the "knock and announce" statute, MCL 780.656, in executing a search warrant).
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> As in *Sobczak-Obetts* and *Stevens*, we find no indication in the language of MCL 764.2a that the Legislature intended to impose the drastic sanction of suppression of evidence when an officer acts outside the officer's jurisdiction. Rather, we believe that the language supports the analysis of several Court of Appeals decisions that the statute was intended, not to create a new right of criminal defendants to exclusion of evidence, but rather to "protect the rights and autonomy of local governments" in the area of law enforcement. [*Id.* at 534-535.]

The Michigan Supreme Court held similarly in *People v Hawkins,* 468 Mich 488; 668 NW2d 602 (2003). In that consolidated appeal, there was no dispute that a search warrant was issued in violation of MCL 78.653 (requiring that when an unnamed informant is used to obtain a search warrant, the affiant provide information concerning the credibility of the unnamed informants or the reliability of the information) and that a bench warrant was issued in violation of MCR 3.606(A) (requiring an affidavit be submitted in support of the probation officer's petition for a warrant). *Hawkins,* 468 Mich 491-496. At the outset, the Michigan Supreme Court noted that it was dealing exclusively with whether a statutory or court rule violation necessitated the suppression of evidence; it was not concerned with the constitutional validity of the underlying warrants. *Hawkins, supra*, 468 Mich 497-498. The Court held that, absent specific legislative intent, suppression of evidence for such violations was not warranted. "[W]here there is no determination that a statutory violation constitutes an error of constitutional dimensions, application of the exclusionary rule is inappropriate unless the plain language of the statute indicates a legislative intent that the rule be applied." *Hawkins,* 468 Mich 507.

Fullerton received information indicating that defendant was intoxicated. Fullerton initially spotted defendant in Oak Park and observed defendant zigzagging in his lane and crossing onto the white lane markers. Fullerton's observations continued a short distance into Berkley, the neighboring jurisdiction, where he eventually stopped and arrested defendant. Although Fullerton's encroachment into the neighboring jurisdiction violated MCL 764.2a, the encroachment was permissible because Fullerton was in pursuit of defendant. MCL 117.34. In any event, the evidence obtained from the arrest need not be excluded because, as discussed at length below, the arrest of defendant was supported by probable cause and was constitutionally valid.

III. PROBABLE CAUSE

Defendant next argues that Fullerton did not have probable cause to stop defendant's vehicle or to arrest defendant. We disagree.

The United States and Michigan Constitutions guarantee the right against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). In general, a search or seizure conducted without probable cause is unreasonable. *People v Lewis*, 251 Mich App 58, 69; 649 NW2d 792 (2002).

In *Terry v Ohio*, 392 US 1, 30-31; 88 S Ct 1868; 20 L Ed 2d 889 (1968), the United States Supreme Court carved out an exception to the general rule that a search or seizure conducted without probable cause is unreasonable. It determined that the Fourth Amendment permits the police to stop and briefly detain a person based on "reasonable suspicion that criminal activity may be afoot." *Terry*, 392 US at 30-31. The *Terry* exception has been extended to incorporate investigative stops under a variety of circumstances for specific law enforcement needs. *People v Nelson*, 443 Mich 626, 631; 505 NW2d 266 (1993). The appropriate test for the validity of an investigative stop under this doctrine is as follows:

> In order for law enforcement officers to make a constitutionally proper investigative stop, they must satisfy the two-part test set forth in *United States v Cortez*, 449 US 411; 101 S Ct 690; 66 L Ed 2d 621 (1981). The totality of the circumstances as understood and interpreted by law enforcement officers, not legal scholars, must yield a particular suspicion that the individual being investigated has been, is, or is about to be engaged in criminal activity. That suspicion must be reasonable and articulable, and the authority and limitations associated with investigative stops apply to vehicles as well as people. [*Nelson*, 443 Mich at 632 (internal citations omitted).]

Thus, reasonable suspicion, not probable cause, was required to effectuate a valid investigatory stop of defendant. *Id.*

A court then should view the totality of the circumstances in light of common sense judgments and inferences of human behavior when determining whether a defendant's Fourth Amendment rights have been violated in the context of a *Terry* stop. *People v Barbarich*, ___ Mich App ___; ___ NW2d ____ (Docket No. 290772, issued February 1, 2011), slip op 3. "Further, when the circumstances involve an informant's tip, courts must examine whether the

tipster's information contained sufficient indicia of reliability to provide law enforcement with a reasonable suspicion that would justify the stop." *Barbarich*, slip op p 3, citing *People v Faucett*, 442 Mich 153, 168; 499 NW2d 764 (1993). In assessing the reliability of a tip, the court considers, in light of the totality of the circumstances: (1) the reliability of the particular informant, (2) the nature of the particular information given to the police, and (3) the reasonability of the suspicion in light of the above factors. *Id.*

The informant, John Tyler Damon, testified at the preliminary examination, but did not testify at trial. At the preliminary examination, Damon testified that he was sitting in his vehicle and waiting in line at a White Castle drive-through. The drive-through had two drive-through windows, i.e., the "first window where you pay," and the "second window where you pick up your food." Damon waited behind a silver Pontiac Solstice that was at the first window. As he waited, he noticed that the driver in the silver Pontiac was arguing with the employee in the window. The driver was loud, and it appeared that the employee was trying to explain something to the driver. Nonetheless, Damon explained that the argument caught his attention because it was loud and drawn out.

Meanwhile, the employee at the second window gestured to the driver in the Pontiac to drive forward to pick up his food. The driver subsequently pulled forward to the second window, and Damon pulled up to the first window to pay for his order. Damon and the employee engaged in a brief conversation and discussed the argument. The employee indicated that he thought the driver in the Pontiac was drunk. While conversing with the employee, Damon observed the driver start to argue with the employee at the second window. Damon asserted that while he could not hear exactly what the driver was saying, the driver was loud and irritated.

As Damon watched, he dialed 911 and informed the police that he was at White Castle and believed that "the guy in the car ahead of [him was] drunk." He requested that the police investigate his complaint. While still on the telephone with the 911 dispatcher, Damon observed the Pontiac hastily pull away from the drive-through window. The Pontiac pulled in front of an oncoming vehicle causing the vehicle to screech to a halt, barely avoiding a collision with the Pontiac. The Pontiac then turned onto Greenfield Road and headed north. Damon informed the 911 dispatcher of the Pontiac's direction of travel and concluded the call.

Police Officer Jesse Fullerton had reasonable suspicion to stop defendant. Fullerton received information that there was a possible intoxicated driver at a White Castle and that the driver was headed northbound on Greenfield Road. Subsequently, Fullerton spotted a vehicle near the White Castle matching the description given by Damon. Fullerton followed the Pontiac and observed the vehicle weaving in its lane and twice crossing onto the lane markers. Fullerton turned on his sirens and emergency lights and followed defendant's vehicle into a driveway.

Damon, a named informant, provided a tip containing sufficient indicia of reliability to provide Fullerton with reasonable suspicion to justify the stop. Damon supplied the police with a description of the vehicle and its direction of travel, i.e., he provided precise and verifiable information to the officer, which suggests that the information was reliable. Further, Damon's tip was based on his first-hand knowledge and nearly contemporaneous observations, which further strengthened the veracity of the information. Damon was in his vehicle behind defendant

as they both waited for their food at the White Castle drive-through. Defendant argued with the employees, and an employee told Damon that defendant appeared drunk. Damon then saw defendant hastily pull out of the White Castle driveway into oncoming traffic, almost causing a traffic accident. In light of the totality of the circumstances, Damon's tip contained sufficient indicia of reliability to provide Fullerton with reasonable suspicion that defendant was intoxicated, justifying the stop.

Even without the tip, based on his observations Fullerton had reasonable suspicion that justified the investigatory stop of defendant's vehicle. Fullerton observed defendant's vehicle zigzag in its lane and cross onto the white lane markers. Fullerton's observations independently raised reasonable suspicion that defendant was operating the vehicle while impaired. In light of the circumstances, i.e., Fullerton's own observations and Damon's tip, Fullerton had reasonable suspicion that justified an investigatory stop of defendant's vehicle. Accordingly, the trial court correctly concluded that the stop was lawful.

IV. CONSENT TO CHEMICAL BREATH TEST

Defendant contends that he did not consent to the chemical breath test administered by Fullerton and that he was forced to take the chemical breath test. He argues that result of the involuntary breath test should have been suppressed. Again, we disagree.

MCL 257.625c provides in part:

> (1) A person who operates a vehicle upon a public highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state is considered to have given consent to chemical tests of his or her blood, breath, or urine for the purpose of determining the amount of alcohol or presence of a controlled substance or both in his or her blood or urine or the amount of alcohol in his or her breath in all of the following circumstances:
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> (a) If the person is arrested for a violation of section 625(1), (3), (4), (5), (6), (7), or (8), section 625a(5), or section 625m or a local ordinance substantially corresponding to section 625(1), (3), (6), or (8), section 625a(5), or section 625m.
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> (3) The tests shall be administered as provided in section 625a(6).

Further, a person arrested for a crime described in MCL 257.625c(1) must be advised of all of the following:

> (*i*) If he or she takes a chemical test of his or her blood, urine, or breath administered at the request of a peace officer, he or she has the right to demand that a person of his or her own choosing administer 1 of the chemical tests.

(*ii*) The results of the test are admissible in a judicial proceeding as provided under this act and will be considered with other admissible evidence in determining the defendant's innocence or guilt.

(*iii*) He or she is responsible for obtaining a chemical analysis of a test sample obtained at his or her own request.

(*iv*) If he or she refuses the request of a peace officer to take a test described in subparagraph (i), a test shall not be given without a court order, but the peace officer may seek to obtain a court order.

(*v*) Refusing a peace officer's request to take a test described in subparagraph (i) will result in the suspension of his or her operator's or chauffeur's license and vehicle group designation or operating privilege and in the addition of 6 points to his or her driver record. [MCL 257.625a(6)(b)]

Defendant was arrested for a violation of MCL 257.625(1) and therefore is considered to have given consent to chemical tests of his blood, breath, or urine for the purpose of determining the amount of alcohol in his blood, breath, or urine. See MCL 257.625c(1)(a). Following defendant's arrest, Fullerton advised defendant of his chemical test rights as outlined in MCL 257.625a(6). Defendant then inquired about taking an alternate chemical test. Fullerton informed defendant that he had to first take the test requested by Fullerton before defendant could take an independent test. Defendant then gave written and verbal consent to take the chemical breath test requested by Fullerton. Fullerton administered that test, instructing defendant to blow into the machine. The test revealed that defendant had a blood alcohol level that exceeded the legal limit. Defendant testified that Fullerton did not threaten him or force him to take the chemical breath test. According to Fullerton, defendant appeared to understand his rights and willingly took the chemical breath test.

Still, defendant challenges the voluntariness of his consent on the basis that Fullerton pressured defendant into taking the test by telling him that his license would be suspended if he refused to take the test. However, Fullerton's statement was proper and cannot be deemed to have unlawfully compelled defendant to consent. In fact, Fullerton's statement was required by MCL 257.625a(6)(b)(v). The statute states that an officer must advise a defendant that "Refusing a peace officer's request to take a test . . . will result in the suspension of his or her operator's or chauffeur's license . . . ." MCL 257.625a(6)(b)(v). Thus, Fullerton's statement regarding the consequence of defendant's refusal to submit to the chemical breath test was appropriate and mandated by the statute. The trial court's finding that defendant's consent was voluntary and that he willingly took the test was not clearly erroneous.

V. INDEPENDENT TESTING

Finally, defendant argues that the chemical breath test result should have been suppressed because the Oak Park police refused to provide him with an independent chemical breath test. We disagree.

The right to a reasonable opportunity to have an independent chemical test is created by MCL 257.625a(6)(d). Specifically, the statute provides:

> A chemical test described in this subsection shall be administered at the request of a peace officer having reasonable grounds to believe the person has committed a crime described in section 625c(1). A person who takes a chemical test administered at a peace officer's request as provided in this section shall be given a reasonable opportunity to have a person of his or her own choosing administer 1 of the chemical tests described in this subsection within a reasonable time after his or her detention. The test results are admissible and shall be considered with other admissible evidence in determining the defendant's innocence or guilt. If the person charged is administered a chemical test by a person of his or her own choosing, the person charged is responsible for obtaining a chemical analysis of the test sample. [MCL 257.625a(6)(d).]

In *People v Anstey*, 476 Mich 436, 448; 719 NW2d 579 (2006), the Court held that suppression of chemical test results or dismissal of a case were not proper remedies for a violation of the right to a reasonable opportunity for an independent chemical test. The *Anstey* Court reasoned that the exclusionary rule is "a harsh remedy designed to sanction and deter police misconduct where it has resulted in a violation of constitutional rights." *Antsey*, 476 Mich at 447-448. The Court concluded that if the trial court determines that an officer failed to give a defendant a reasonable opportunity for an independent chemical test, the appropriate remedy then would be to provide, at the defendant's request, a jury instruction regarding the statutory violation. *Id*. at 450. The *Anstey* Court reasoned:

> The jury should be permitted to weigh the police officer's wrongful conduct as well as the statutory right that the officer denied. When the defendant argues before trial that he or she was deprived of a reasonable opportunity for an independent chemical test, the trial court must determine, after an evidentiary hearing if necessary, whether the defendant was in fact deprived of this statutory right. If the court determines that a statutory violation occurred, then it is free, upon request of defense counsel, to inform the jury of this violation and instruct the jury that it may determine what weight to give to this fact. Such a jury instruction is an appropriate consequence for the violation of a mandatory statutory right to a reasonable opportunity for an independent chemical test because it will accord meaning to the right created in subsection 6(d) without creating a remedy that the Legislature did not intend. A jury instruction will also presumably deter police officers from violating that right in the future. We offer the following possible instruction for violations of MCL 257.625a(6)(d):
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> > Our law provides that a person who takes a chemical test administered at a peace officer's request must be given a reasonable opportunity to have a person of his or her own choosing administer an independent chemical test. The defendant was denied such a reasonable opportunity for an independent chemical test. You may determine what significance to attach to this fact in deciding the case. For example, you might consider the denial of the defendant's right to a reasonable opportunity for an independent chemical test in deciding whether, in light of the nonchemical test evidence, such an independent chemical test

> might have produced results different from the police-administered chemical test. [*Id*. at 450-451.]

It is undisputed that defendant requested an independent chemical test and was not given such a test. Notwithstanding this violation, the appropriate remedy is not suppression of the result as defendant requests. The challenged violation is of a statutory right, and exclusion of evidence is not a proper remedy under these circumstances. See *Anstey*, 476 Mich at 447-448 (a "dismissal, which is an even more drastic remedy [than the suppression of evidence], is not an appropriate remedy for a statutory violation . . . .")

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher